AMERICAN BANKERS INSURANCE ASSOCIATION
An affiliate of the AMERICAN BANKERS ASSOCIATION

1120 Connecticut Avenue, NW
Washington, DC 20036

202-663-5163
Fax: 202-828-4546
www.theabia.com

Beth L. Climo
Executive Director
bclimo@aba.com

August 16, 2004

Via Electronic Mail

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave., N.W
Washington, D.C. 20551
Attn: Docket No. R-1203
regs.comments@federalreserve.gov

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429
Attn: RIN 3064-AC73
Comments@FDIC.gov

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552
Attn: No. 2004-31
infocollection.comments@ots.treas.gov

Office of the Comptroller of the Currency
250 E Street, S.W.
Mail Stop 1-5
Washington, D.C. 20219
Attn: Docket No. 04-16
regs.comments@occ.treas.gov

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex Q)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
Attn: No. R411006

Re: Proposed Rule: Fair Credit Reporting Affiliate Marketing Regulation Comments of the American Bankers Insurance Association

Dear Ladies and Gentlemen:

The American Bankers Insurance Association[1] ("ABIA") provides the following comments on the Fair Credit Reporting Affiliate Marketing Regulation (the "Proposed Rule") proposed by the federal banking regulators and the Federal Trade Commission ("FTC") (collectively "the Agencies"). While ABIA supports, and incorporates by reference, the attached comment letter of its parent, the

[1] The American Bankers Insurance Association's mission is to develop positions and strategies on bank-insurance related matters, represent those positions before state and federal governments and in the courts, and support bank-insurance related programs and activities through research, education and peer group information sharing.

American Bankers Association ("ABA"), ABIA has several areas of concern, some of which are unique when viewed from the perspective bank affiliated insurance agencies.

Before commenting on several of the provisions in the Proposed Rule and their impact on the bank-insurance industry, some background on how insurance products are marketed may be helpful. Although some insurance companies sell insurance directly to consumers as "direct writers," under most circumstances, insurance is sold through licensed agents appointed by insurance companies to sell insurance products on their behalf. The agent[2] usually is the individual who solicits the sale of insurance from the consumer; who "binds" insurance coverage before issuance of an insurance contract; and who processes insurance policy renewals and claims. Although it is the insurance company's products that are being sold, because of the unique relationship between the consumer and the agent, the consumer often sees the insurance product as being the agent's product. To most of the buying public, accordingly, the agent is the face of the insurance company. This is also the case in the context of bank-insurance sales.

I. Specific Comments from the Perspective of Insurance Affiliates

The Final Regulation Should Not Address The Issue Of "Constructive Sharing," A Concept That Has Limited Utility In The Insurance Context.

In the Proposed Rule, the Agencies ask for comment on whether Section __.20(a), which establishes a duty on the person that communicates eligibility information to an affiliate, "should apply if affiliated companies seek to avoid providing notice and opt out by engaging in the 'constructive sharing' of eligibility information to conduct marketing." As described by the Agencies, constructive sharing occurs when a bank uses its own information to make marketing solicitations to its own customers concerning an affiliate's products or services and the consumers' responses provide the affiliate with discernible eligibility information about the consumers. As an example, the FTC asks for comment on a scenario in which an insurance company affiliated with a bank provides specific eligibility criteria to the bank for the bank to make insurance solicitations on behalf of the insurance company – the issue being whether a notice and opt out is required for the bank to engage in marketing using eligibility criteria received from the insurance affiliate.

ABIA specifically supports ABA's comments regarding why the final regulation **should not** address the issue of "constructive sharing." Moreover, in the insurance context, it is important to recognize that constructive sharing of customer information would have limited utility given restrictions on how insurance is marketed. In all states, an insurance agent's license is required to solicit the sale of insurance products. To avoid the need to license a bank as an insurance agency and to license individual bank employees as insurance agents; and to take advantage of the broad insurance powers afforded most bank affiliates; banks, generally speaking, establish insurance marketing operations in

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[2] Agents usually are employed by an insurance agency.

an insurance agency affiliate (either as a subsidiary of a financial holding company or a financial subsidiary of a bank) rather than in the bank itself. Unless a bank and its employees were to be licensed respectively as an insurance agency and as insurance agents, they could not market insurance products on behalf of an insurance affiliate without violating agent licensing laws. Consequently, it is unlikely that a bank would use information gained through "constructive sharing" to market the insurance products of an affiliate, irrespective of whether the affiliate is an insurance company or an insurance agency selling on behalf of an insurance company.

The Definition Of "Pre-existing Business Relationship" Should Leave No Question That It Includes A Relationship Between A Consumer And An Affiliated Insurance Agency.

Section __.3(m) (see also FTC's Section __.3(i)) defines "pre-existing business relationship" as a relationship between a person and a consumer based on:

> (1) A financial contract between the person and the consumer which is in force on the date on which the consumer is sent a solicitation covered by subpart C of this part;
>
> (2) The purchase, rental, or lease by the consumer of the person's goods or services, or a financial transaction (including holding an active account or a policy in force or having another continuing relationship) between the consumer and the person, during the 18-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or sent to the consumer; or
>
> (3) An inquiry or application by the consumer regarding a product or service offered by that person during the 3-month period immediately preceding the date on which a solicitation covered by subpart C of this part is made or sent to the consumer.

We believe that in each of these three situations, the Agencies' intent is that an insurance transaction between an affiliated insurance agency and a consumer qualifies as a pre-existing business relationship. Subsection (3) clearly embraces such a result; it refers to a "product or service *offered* by that person [the insurance agency]. . . ." (emphasis added) In the other two subsections, the language is not as clear. Subsections (1) and (2) refer to a financial contract or a financial transaction "*between* the person and the consumer. . . ." (emphasis added) While the insurance contract is between an insurance *company* and the consumer, the relationship is between the insurance *agency* and the consumer. The Agencies should clarify that the definition of "pre-existing business relationship" includes a relationship between a consumer and an insurance agency under all three scenarios.

Such an interpretation would be consistent with the policy behind the pre-existing business relationship exception. As expressed in the preamble to the Proposed Rule, the scope of the pre-existing business relationship exception is based on "the reasonable expectations of the consumer." As discussed in the introductory section of this comment letter, the agent is the seller of the insurance product and the entity with which the consumer has the insurance relationship. A consumer who buys insurance through a bank-affiliated insurance agency will not be surprised to later receive solicitations for other insurance products based on eligibility information the insurance agency has received from an affiliated bank. Therefore, a pre-existing business relationship should be deemed to be created when a consumer buys insurance from an affiliated insurance agency.

Use Of Eligibility Information Following A Consumer's Affirmative Authorization Or Request.

The example in Proposed Rule Section _.20(d)(3) describes a situation in which a bank's mortgage customer asks the bank about information concerning insurance offered by the bank's insurance affiliate. The example permits the insurance affiliate to use the customer's eligibility information received from the bank for marketing purposes in responding to the customer's request without the customer having been given an opt out opportunity. The customer's request for such information may be given in writing, orally, or electronically. ABIA supports the Agencies' interpretation of the "affirmative request" exception to the opt out requirement, given that it is common for a bank customer to ask a bank for information about products and services offered by an insurance affiliate. In those situations, there is no need for the customer to be provided with a notice and opt out.

II. Other Comments

The Final Regulation Should Not Impose Additional Duties On Entities That Share Eligibility Information.

The ABIA agrees with ABA's comments on two related issues: (1) that the final regulation should not impose duties on the entity that shares information with an affiliate; and (2) that the final regulation should not dictate whether the giver or receiver of eligibility information should provide the notice and opt out. The notice and opt out is not required to be given when an exception applies, such as when the user of the information has a pre-existing business relationship with a consumer. Only the user of the information knows whether a notice and opt out is required to be given before eligibility information received from an affiliate is used. Any duty, therefore, should fall only on the user of the information. The user should be responsible for assessing whether the duty must be fulfilled and, if so, how it should be fulfilled – either by arranging for the affiliate that shared the information to provide the notice and opt out or by satisfying that requirement itself.

The Definition Of "Eligibility Information" Should Not Include A Bank Customer's Name, Address, Or Account Number That A Bank Shares With An Affiliate.

The Proposed Rule regulates the use of "eligibility information" and defines eligibility information as information described in Section 214 of the Fair and Accurate Credit Transactions ("FACT") Act. Section 214 of the FACT Act defines that type of information as information that would constitute a "consumer report" pursuant to the Fair Credit Reporting Act ("FCRA") but for the exclusions from that definition for "transaction or experience" information and "other" information. Section 603(d)(1) of the Fair Credit Reporting Act defines a "consumer report" as "any written, oral or other communication of any information by a consumer reporting agency bearing on the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part *for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance* to be used primarily for personal, family, or household purposes, employment purposes, or any other purposes authorized in Section 604 of the FCRA." (emphasis added)

A bank customer's name, address, and account number do not bear on the customer's eligibility for credit or insurance. Such information merely identifies the bank customer and any associated accounts.[3] The Agencies should make clear that eligibility information does not include customer name, address, or account number.

Thank you for considering these comments. Please contact the undersigned at (202) 663-5163, or ABIA's legal counsel, Jim McIntyre or Chrys Lemon, at (202) 659-3900, if you have any questions concerning these comments.

Sincerely,

Beth L. Climo

Attachment (ABA comment letter)

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[3] A bank customer's name, address, and account number constitute "nonpublic personal information" pursuant to Title V of the Gramm-Leach-Bliley Act. That act and its associated privacy regulations restrict the disclosure of such information to a nonaffiliated third party. The disclosure of customer account numbers to a nonaffiliated third party for marketing purposes is further restricted. *E.g.*, 12 C.F.R. §§ 216.3(n)(1); 216.10; 216.12.